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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1999

JOSEPH N.Y. TSU and CECILIA W. TSU
Petitioners

vs

JOHN A. VOS, LAW OFFICE OF JOHN A. VOS and DOES 1 through 10
Respondents

On Petition for Writ Of Certiorari
To The California State court of Appeal
For The first Appellate District, Division Two

PETITION FOR WRIT OF CERTIORARI

Joseph N. Y. Tsu & Cecilia Tsu
213 Cleveland Court
Mill Valley, California 94941
(415) 388-3862

Petitioners Pro Se

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QUESTION PRESENTED

Whether the due administration of the bankruptcy court was defeated in defeating the provisions of title 11 for the purpose of removing the rehabilitation right of the debtors.

Whether a law firm abandoned its clients' best interests in deference to the conflicting interests, jointly in violation of the provisions of title 11 and the due administration of bankruptcy court intentionally and malicious inflicted on his clients the irremediable and substantial injuries needed to be proven through expert witness.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Pro se, Joseph N. Y. Tsu and Cecilia W. Tsu, husband and wife respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

.The opinion of California State Court of Appeal appears at Appendix "A" to the petition and is unpublished. (App 1-12). Order denying Petition For Rehearing by the state court of Appeal appears at App 13. The opinion of the State Trial court appears at Appendix "B". (App 14-17). Order en banc denying Petition for review by the Supreme Court of California appears at Appendix "C" (App 18).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.§1257(a). This case involves federal questions of provisions of title 11 and 42 U.S.C. §1983. The validity of statutes of California is drawn in question on the ground of its being repugnant to the laws of the United States or where title 11 is specially set up. The date on which the California Supreme Court decided the case en banc and denying reviewing was February 16, 2000.

A RELATED CASE INVOLED

U.S. supreme court case No. 99-7178, pending for the Petition for Rehearing, Tsu v. Tracy Federal Bank; U. S. Small Business Administration; Spencer P. Scheer, et al. They were the creditors

of the underling chapter 11 case of the instant case. Mr. Vos Esq. the respondent was the attorney for the Tsus. the debtors. This related case was filed after the discovery of the concealed joint acts of Vos with the creditors.

STATEMENT OF THE CASE

Underlying Chapter 11 Case

This is about how the due administration of the bankruptcy court was defeated in defeating the provisions of title 11 and the rehabilitation right of the debtors.

Bankruptcy court, a federal judicial system was easily "hijacked" by defendant, Mr. Vos, esq. who represented us, the debtors, in the chapter 11 proceeding, with the creditors of a SBA loan, the defendants of the related case stated above.

Without a hitch, our case was dead upon arrival. Two estate properties secured by this SBA loan with equity of the redemption and business, necessary for the reorganization were removed from the jurisdiction of the court and under the control of the creditors. Before we had the opportunity to submit the plan of reorganization case was dismissed again, were twice at the verge of being evicted with our tenant. Bankruptcy judge, the expert, was also kept in the total ignorance of the proceeding. Vos violated his trust.

While purporting to serving us, he assumed a position adverse and antagonistic, without our free and intelligent consent he abandoned our interest and rights, and knowingly and fraudulently concealed the fact of and how the estate prorperties had been transferred to the creditors with his help.

Such practice in the federal court believed by the California courts to be "in compliance with prevailing standards of legal practice in handling bankruptcies and that no conduct on Vos part caused any damages." (App 9)

Background. The holders of the SBA loan, had put us in catch 22 position and failed to correct known errors cumulated in the past years. Than, the business was slow, though, the loss was not much, about ±$1,000 per month. But when they decided to call the erroneous default of $140,000, we were advised to seek chapter 11 protection. Because SBA still would not allow the relieve and sell of the cross collateral (APP 34), a rental building which would have pay down almost the half of the loan (APP 34), and keeping the one with our 200-seat restaurant, as Vos stated in the court.

Chapter 11 Fee Agreement and Court Order of employment by the estate stated: "Preparing and filing of Petition, statement of Financial affairs schedules, disclosure statement, Plan of Reorganization...." with "no adverse interest" was filed in court. $6,100 retainer was paid.

The intricacies were under the wraps.

I. Dismissal & transfer in Violation of 11 U.S.C. §362, automatic Stay & due administration of court

On July 23rd, 1993 after the last attempt to avoid the bankruptcy was failed,Vos whom we met in January filed Chapter 11 petition by which automatically stayed, §362, the foreclosure proceeding of the SBA loan of the two buildings with our business necessary for the reorganization.

On Aug 20th, 93 **case was dismissed,** stay

was removed. Two estate properties were foreclosed, Vos deemed dismissal to be the result of the court's minor administrative failure. The actual cause of dismissal uncovered and ignored by the state courts was, the incomplete petition papers filed. A blank schedule H was not in the complete petition papers filed (App 22), it was filed (App 26) after the foreclosures, in concealment, which was never reported to the court nor disclosed to his clients by Vos. Attorneys have "an ethical obligation to report incidents of professional misconduct. Model Rule of Professional conduct 8.3 (1983) *Collier on Bankruptcy* ¶8.01[3][b] Prof responsibility, Matthew Bender 12/96]

On Sept 23rd, 93 case was reinstated **after** the foreclosure sales of the two buildings in the total loan amount claimed on Sept 8th, 93, and **before** the recording of the Trustee's Deeds of Sale.

On Oct 18th, 93, in concealment, deeds were recorded (APP 28) by the creditors with actual knowledge of reopening of the case, transferred the estate properties, [Cal.Civil. Code §§1213-1215 Transfer occurs at the recording of the deed], ignored by Vos.

II. At the inception of the reorganization, the Chpater 11 was intended to be defeated. Vos provided for the foreclosures in violation of orders, law, two false moves to mislead the court.

Violation of Aug 6, 93 Order, Rule 1007(c): "the debtor(s) in this chapter 11 case have failed to file schedules ,..... with the petition ... Rule1007(c). Accordingly, pursuant to 11 U.S.C. ....you are hereby notified that this case will be dismissed no earlier than **15 days from July 23, 1993** ... within that 15 day period:.... 1. The debtor(s) files all appropriate schedules, ... 2. ..... files a written

objection to this order and request a hearing."

On Aug 20th, Order/Notice of dismissal stated "Notice is given the debtor(s) having failed to comply this court's order of Aug 6, 1993 and to objections having been filed, it is ordered this case is hereby dismissed."

Violation of Rules 7062, (Fed Civ Pro Rule 62), **8002(b) for failure to file motion to revive the case** and a blank Schedule **H in 10 days from Aug 20th,** or on or before Sept 8th, the foreclosure date

Instead two fraudulent Ex-parte requests were filed (App 23, 25) to mislead the court (App 29), and intentionally failed to disclose the missing of a blank schedule H in the petition filed.

When Order of his first misleading Ex-parte Application for Extension of Filing was granted, filed and entered the court docket on Aug 27th 93, (App 23), a blank schedule H was to be withheld for additonal ninteen (19) more days.

After on Sept 8th 93 properties were foreclosed. On Sept 14th his second, fraudulent Ex-part Vacating Erroneous Order of Dismissal (APP 25) was filed. On Sept 15th 93 a blank schedule H stating "Debtor has no co-debtor" (APP 26) was filed in concealment. It was 26 day after Aug 20th dismissal, 54 days from the case was first filed.

[Rule 3-110 Failing to act competently, Rule 3-200 prohibited objectives of employment, Rule 3-300 interests adverse to his clients, Rule 3-500 failed to communicate to his client about the missing scheudle, Rule 5-220 Suppression of evidence, Rule of Prof conduct of the State Bar of California at 319ff]

His four falsified letter (at PP. 11-14) , considered by the state appeal court to be genuine, upon which its ruling was based, never explained the filing of schedule H or any of his undisclosed failures under his fiduciary duty.

III. Then misrepresentation, inaction or intentional blind *U.S.v. Campaglia* 628 F.2d 632, 642 (1st Cir 1980) cet denied 449 U.S. 956.

Fraudulent Proof of claim was filed by SBA on Dec 1st, 93 legally there was no claim any more; estate proeprties had been under creditor's control since deeds were recorded on Oct 18th, 93.

Vos' Opposition to Motion Validating Sale also was filed.1/ 1/ (1) The post-recommencement recording of deed is void under §362, *Kalb v. Feuerstein* 308 U.S. 433, 438-40 (1940), *In re* sores 107 F.3d 969 (1st Cir 1997) *In re Schwartz* 954 F.2d 569 (9th Cir 1992); (2) Transfers were voidable under §549, and properties were recoverable under §550, In re *Southeast Hotel Pro. Ltd. Partnership* 99 F.3d 151 (4th Cir 1996); (3) §542(a) provides that an entity in possession of estate property shall deliver such property to the trustee/debtors in possession. *U.S. v. Whiting Pools, Inc.* 462 U.S.198, 202 (1983).

Again on Dec 6th 93 court hearing, Vos intentionally failed to disclose the missing Schedule H nor the recorded information the court has the right to know 18 U.S.C §152, he reaffirmed the dismissal was court's mistake (App 29). [Rule 5-200, Trial conduct, 5-220 suppression of evidence, Rule of Professional conduct of the State Bar of California, at 438, 443]

Case was meritorious he told the judge, and detailed the facts (APP 34) in support of his statements, disregarded by the appellate court, in contrast with his four fraudulent letters (pp. 11-14)

Bankruptcy court agreed with him, and stated foreclosure sale is incomplete without recording or perfecting of deed (App 29); the Plan would take care of it (App 29). Therefore, conditions of the continuance of stay would be relieved and to record the deeds (APP 29-30) were ordered, among them, (A) **Vos was to file a motion under**

§363 by Dec 20th 93, (B) Plan of Reorganization and Disclosure Statement be due on Feb 1st, 94 as suggested by Vos (App 30).

Fraudulently altered order filed. On Jan 3rd, 94 the Dec 6th order was fraudulently altered and filed (App 32), the condition of relief of stay ***to record*** the deed (App 29-30), was changed to ***to validate*** the deeds. *A recording date was used, **Sept 8th, 93,*** not Oct 18th, 93 (App 28) of the recording date on the deed, without Vos signature, contrary to what he stated in court (App 30).

Without a word he disappeared, disregarded his duty of the pending reorganization plan and disclosure statement. It was discovered a Declaration filed by Tracy, that since Dec 7th 1993 (App 31), right after the Dec 6th hearing, he was beyond reach. [Rule 3-110 Failing to act competently, Rule 3-500, Communication, *Rule of Prof conduct of the State Bar of Calif, West's Annotated Calif Codes 1996*]

IV. Total abandonment by Vos before the opportunity to put forward a plan, he defeated chapter 11 for good. An invalid assumption that we were not interested in proceeding with the case, as stated in his four falsified letters (pp.11-14) prejudicially accepted by the State Appeal court.

He violated court order of a conditioning continuance of stay, ordered by the court on Dec 6th, 93 (App 30) by failing to file a required Motion under §363 by Dec 20th, 93. [§6103 Codes Disobedience of court order, codes of Calif Business & Professions, West's Annotated Rule 3-110 Failing to act competently; Rule 3-500 failing to communicate to his clients, Rule of Prof conduct of the State Bar of California at 354, 403] Thus the stay was removed, the deed recorded in violation of stay were "validated" as stated in the fraudulently altered

condition in the order filed on Jan 3rd 94. (App32)

He violated an another court order **caused the 2nd dismissal**, by failing to attend the status conference without communicating to his clients and the court. [§6103 Disobedience of court order, Rule 3-110 Failing to Act Competently, Rule 3-500 Communication] in spite its Notice/order filed on Nov 19th 93 stated:

> "Debtor's attendance (through counsel if debtor is represented) is required if debtor fails to appear, the court may without further notice or hearing order at said status conference, that the case be dismissed."

Vos never returned our repeated phone calls, nor attempt to revive the case. In fact his letter sent to the Clerk, U.S. Bankruptcy court before he was relieved from his duty already stated:"This case is dismissed; This firm no longer represents the debtors;" [Rule 3-200 prohibited objectives of employment, Rule 3-300 in aiding interests adverse to his clients Rule of Prof conduct, State Bar of Calif]. In fact, the dismissal was not final yet! He intended it to be final. He was confidently waiting for us to be evicted.

Notices of Possession [which has a fraudulent transfer date of Sept 8th 93] with the complaint and summon were served on us and the tenant for the second time. Business was inventories after our motion pro se to vacate had been filed.

A motion pro se to vacate the dismissal (App 33) was able to be filed in 10 days with a letter to the judge. Because we were so desperate finally the Clerk of the Court believed us and taught us over the phone to prepared the motion to vacate and got a hearing date. This was the turning point.

State courts disregarded his entire violations including termination of his employment without required notice, hearing and order, under §554(a)

and (b) and Rule 6007 and the State rule [Rule 3-700 Termination of Employment] which caused us the irremediable injury. Non of these were explained in his falsified letters (PP. 11-14) either.

V. What stated in the Fee Examination order <u>also ignored by State courts.</u>

> "In the course of reviewing debtor's motion to vacate this court's January 24, 1994 order dismissing the above entitled case/1 .....(1) that John A Vos the attorney of the record for the debtors, failed to appear at the duly scheduled status conference on Jan 7, 1994; (2)..the case was dismissed because either Vos nor the debtors appeared at the status conference; and (3) that the court has no record of any order relieving Vos as debtor's attorney of record. Accordingly, Vos shall appear for a Fee Examination under U.S.C. §329 on March 7, 1994 at..... <u>'S/Thomas E. Carlson</u> U.S. Bankruptcy Judge 1/ The motion to set aside the dismissal was "prepared by the debtors proceeding in pro per (APP 33) and is scheduled for hearing on February 14, 1994 at 9:00 a.m."

VI. Damages are irremediable and substantial. Fire sales in six months, was ordered through the mercy of the court which saved us some of the equity to live on, the right to submit plan of reorganization was not reinstated. We lost our life time savings in the buildings and an AAA and Mobil travel Guid recomended business of last 8 years, forced to be retired unexpectedly at old age. Fire sales was not Vos' intended consequence either, any amount salvaged was too much for him.

A second attorney came in to rewrite the

motion to vacate the dismissal, listed the wrongs (Appellant Appendix 1083-84) of Vos but never discovered the fraud, nor did the Bankruptcy judge, such as the missing of a blank schedule H and its filing in concealment, which Vos had the duty to disclose.

Creditor quitclaimed deeds to us in order for us to execute the grant deed to the buyers.

VII. The petition for protection was well founded. Vos intended SBA to get the secured collaterals.

The errors in the loan did exist. Total secured claim supposed to be $825,446, actual payoff was $686,841; over claimed $138,822 which was almost equal to the claim of default.

The SBA loan was never impaired, was over secured. Their scheme, frustrated by the fire sale, was to obtain 2.43 times of the loan [based on 1984 appraised value on the buildings and business improvements]. Support by the fact, Vos already had decided that secured creditors entitled to the over secured collaterals.

His false claim in his falsifed letters (PP. 11-14), accepted by the appellate court, that it was not reorganizable, for lack of earning power of collateral. There was plenty of equity and other property could also be used in the plan of reorganization (App 34), by selling the rental building which would have pay down almost the half of the loan stated by Vos (APP 34) in court.

VIII. Bankruptcy court's access to accurate information was denied by the continued misrepresentation, [undertaken with the proscribed criminal intent.] *U.S. v. Mody* 923 F.2d 341, 347 (9th Cir) cert. denied 502 U. S. 821 (1991).

The court never knew the true state of the case, that also caused the damage. On both occations of reopening, the case was unable to be reopened properly, which result the fire sales.

A blank Schedules H was not prepared, then we would not have been forced to sell our properties with our business at a fire sale.

The avoidance powers contained in §549 was prevented to be invoked In re N.Y. Intern. Hostel Inc. 157 B.R. 748 753 (S.D. N.Y. 1993). 2/ Transfers were unable to be challenged.

2/ Postpetition transfers properly challengeable under Section 549. The deed were deemed void *In re Walker* 861 F.2d 597 (9th Cir 1988), *In re Williams* 124 B.R. 311 315 (Bankr C.D.Cal 1991) "Having established the post-petition character of the transfer, debtor has proven her prima facie case to void the transfer." *In re Taylor* 884 F. 2d 478 482 (9th Cir 1989).

Vos' conduct was a knowing breach of his contract in deference to the adverse interest, and in concealing his breach, violation of the oath and duties of attorney, [Business and Profession Code §§6067, 6068], and violation of his fiduciary duty of disclosure

Such practice in the federal court held by the California appellate court to be "in compliance with prevailing standards of legal practice in handling bankruptcies and that no conduct on Vos part caused any damages." (App 9)

IX. VOS' Four Falsified Letters claimed had been sent to the Tsus. Their first appearance were during the deposition on Aug 17, 1995, we denied had ever seen them before, (Appellants' Appendix 1347-1369), with reasons why not to be genuine.

False lettle No. 1 dated August 19, 1993.

"As a fiduciary you collect some income from the

properties under your controll .....Should you need to invade any of those sources of funds for purposes other than payment of mortgage, it is necessary to request permission from the lender(s) and the Judge to do so ....." (Vos should have known better around August 1993 to file a Motion under 11 U.S.C. §363, to obtain permission from the court as he was ordered by the court on Dec 6th 93 since he had failed to do so earlier (APP 30)

False letter No. 2 dated October 13, 1993

"...it is necessary that a financial projection be submitted to the Court AS SOON AS POSSIBLE showing that income will be available to dig your property out of the hole. " (No request of any required financial projection around October, 93 or any time. Only on Dec 6th, 93 Court ordered him to file the disclosure statement and plan of reorganization by Feb 1, 94. (APP 30)

False letter No. 3 dated November 5, 1993

"Your focus on the small interest error by Tracy Federal Bank ...is insignnificant compared with the overall picture: .... " (Total claim plus post-petition payments supposed to be $825,664, actual pay-off was $686,841; difference was $138,822)

False letter No. 4 Dated December 8, 1993

There are multiple falsities, or contradictions from the facts and/or law, such as the following seven:

(1) "As you may recall from our appearance before Judge Carlson last Week,..." (It was on Dec 6th, 93, Monday, two days ago. (APP 29-30, 32, , 34)

(2) "You need to provide a complete accounting of the cash proceeds .... from the Geary Property. You should mail a copy to counsel for Tracy Federal Bank file one with the Clerk of the court [just as you do with your Monthly Operating Report], and I would appreciate receiving a copy..." "If you wish to use such funds in future months then you will need to make application to

the Court for permission to do so. the filing and hearing of such an application cannot be done overnight; if you need me to prepare one for your, please let me know well in advance so that I might prepare and present same to the court on your behalf. If I do not hear from you then I assume you now will simply continue to forward rents and profits to Tracy Federal Bank. (Not so, in accoridng to the Transcript of court hearing. Vos was ordered by the court to file a Motion to get permission from the court to use the rental income on Dec 6th 1993 (APP 30). According to the Declaration filed by the creditors, (APP 31) he had been disappeared right after the hearing on Dec 6th, 93. . This Dec 6th Order fraudulently altered and filed on Jan 3rd without the Judge's signure, was not even signed by Vos (APP 32).

(3) "Unless all of these things are ....completed in a timely manner, as you heard the Judge say, the ....foreclosure sale .....will be confirmed by the court." (The Judge stated the conditions when deeds could be recorded, not the confirmation of the sale;(APP 29) foreclosure were not concluded until the deeds were recorded. (APP 29) But the fraudulently altered order filed on Jan 3rd 94 (APP 32) stated the "On **Setp 8, 93,** trustee's deeds upon sale were recorded... The recordation of secured creditors' trustee's Deeds upon sale and perfection of title shall only be deemed valid in accordance..... How could Vos did not know the recordation took place on **October 18th, 93** (APP 28) not Sept 8th, 93.

(4) "...we have spoken in general terms of varieties and permutation of chapter 11 debt....It is now time to get very specific." (Vos had known the specifics, which would be incorperated in the plan, as he stated on Dec 6th 93. (APP 29,-30, 34) He failed to state in court. (App 29-30)the loan balance was in error, and deed had been recorded

(5) "Working with 'Yan Can Cook' is an option, but perhaps you have been waiting too long for that to jell."(On Dec 6th he did not state so to the court (APP 29-30, 34)

nor the court thought it was too late.(APP 29-30).why it was so two days later.)

(6) "....perhaps you would prefer to have your chapter 11 case dismissed. ...you other investment property personal home and Mercedes-Benz ...may be kept from the clutches of your creditors.

(On Dec 6th 93, suppose to be two days before this Dec 8th letter, he told the court the case was meritories (APP 34, 29-30). He forgot what he stated: the second property could pay off the half of the SBA loan; and a third properties also can be applied for the plan of reorganization (APP 34). There was absolutely no reason to have our reorganization case dismissed. All the other assets had nothing to do with the SBA loan, and were current or free and clear as shown in the petition prepared by Vos. When he took the case he believed the case was very meritorious, that was in July of the same year.)

(7) "Should you have any trouble comply with what you heard the Judge direct you to do..... should you have any preferences to stay in chapter 11...." (Vos failed to comply with what Judge had directed him to do to file Motion under §363 by Dec 20th 94 (APP 30) nor help us to file the plan and disclosure statement by Feb1, 94. (APP 30) He had disappeared since Dec 7th (APP 31) and failed to attend Jan 7th scheduled statutes conference which caused the 2nd dismissal of the case; Fee Examination was ordered by the court. But the dismissal would have allowed the creditors to repossess the properties, had the fire sales not been ordered.)

State Courts

I. Pretrial hearing, before Honorable Peter Allen Smith, superior court Judge

In January 1995 when the complaint was filed it was merely based on the Fee Examination order, the cause of the second dismissal, the only known

fact at the time, for breach of contract, breach of fiduciary duty, negligence, and intentional inflating emotional distress.

On Oct 16th 96 the pretrial hearing concealment was not suspected yet. The request for the missing Schedule H (App 24) from the clerk of bankruptcy court was discovered in Vos' file on the occasion of the deposition.

Among the issues discussed were:

1. Expert witness: Judge Smith: "I was looking for her case, that she (Cecilia Tsu) doesn't need an expert standard of care case..... If the evidence is so clear, like if you were a doctor and your right leg was broke, and they operate on the left, you wouldn't have to get an expert. (Appellant's Appendix 674)
2. No expert witness needed on the cause of the second dismissal of the case. Vos' attorney: "....we'll say it here today, an expert probably is not needed on the issue of whether it's below the standard of care for Mr. Vos to miss the January 7th, 1994 status conference which resulted in the dismissal of the bankruptcy action." (Appellants' Appendix 691:21ff-692:13) Also "is the fees that second attorney charged them..." (Appellants' Appendix 674)
3. An invalid assumption and the missing schedule: Judge Smith: " They say it's more than that I know, I'm listening to everything....that defendant made an invalid assumption they were not interested in proceeding with the case ... he should have know--he knew they wanted to proceed. Secondly,...that Schedules weren't prepared, then they would not have been forced to sell their real estate at a fire sale. As a result of that, they lost X,Y,Z, dollars." (Appellants'

Appendix 697:2-13)

4. Plaintiffs can argue that they were abandoned by his attorney. (Appellants' Appendix 676:25-27, 686:16 - 687:5)

II. Continuance, new discoveries and the related complaint filed

On Oct 16th, 96, after pretrial hearing continuance was requested by Vos. During this period waiting for the trial to be resumed, the actual filing of Schedule H (App 26) was discovered on the docket sheet by accident. That led us the suspicion and the other discovery and the understanding of the joint acts with the creditors.

The complaint against the creditors was then filed in U.S. District Court, the related pending U.S. Supreme Court case No. 99-7178.

A motion In limine to amend the pleading (APP 21) was ready to be submitted on July 16th 97, an another new trial date cancealed too.

III New trial judge Hon. William T. McGivern.

No discussion, no solution of issues, law or fact.

Feb 1998 a brief on the federal issues was ignored at the special settlement conference held before a new appointee to the municipal court [here combined with the superior court] at the eve of his first reelection.

The trial not only failed to promote justice even failed to maintain the appearance of justice in the eyes of the jury and the public. During the voir dire, judge was asked by juror ID No. 311573, if the case had been already predetermined, as he repeatedly stated that it was to be dismissed, why bothered to go through the trial. Nonsuit for lack of expert witness, over the objection (App 21) did

entere. It was based on prima facie. **Bifurcation** of the trial was ordered without notice; evidence of damages therefore were barred. Non of the federal issue was adjudicated.

1. At the beginning of the trial **Motion to add conspiracy to commit fraud,**3/ was filed, the delayed discovered issues, in the causes of action was denied. Court stated, .."some of the items on here are beyond the jurisdiction of this court...." (RT 133:11-22) Where in *Day v. Rosenthal* (1985) 170 Cal App 3d 1125, 1159 cert den 475 U.S. 1048, "An intentional failure to disclose is an actionable fraud in the presence of a fiduciary duty to disclose."

2. Defendant's motion (App 19) of no expert required in causing the 2nd dismissal -- the failure of Mr. Vos to appear at the Jan 7, 94 Status conference, -- to limit liability and causation evidence was denied.

3/ "....Conspiracy is based on fraudulent or intentional misconduct, which caused the damages of the plaintiffs. The facts show the law firms, defendant and the lender's have engaged in a persistent course of conduct in concert, flagrantly disregarded the Bankruptcy Rules, codes and court Orders. Bankruptcy codes were a 'device' or 'gimmick' for attorneys to manipulate the chapter 11 system, and to deceive the presiding judge, at the expense of their unknowledgeable clients, in furtherance of their tacit agreement to defraud his clients/ debtors of their said properties in bankruptcy.... 1. False promises/contract with fraudulent intent not to perform such contract; 2. Obstructed the due administration of law provided under Bankruptcy codes, Bankruptcy Rules and acts; 3. False moves or failed to move in the bankruptcy proceeding; 4. Concealing and misleading, the misconduct in court; 5. Committed bankruptcy crime.
6. Falsified evidences."

3. It was held the causes of action was merely **"breach of professional duties"** (App 14), to force the issue on expert witness, and erroneously removed the others causes. Where in *Stanley V. Richmond* (1995, 1st Dist Div Two) 35 Cal. App. 4th 1070, 1086, the same Division Two of the First Appellate District of this instant case. it was held "the trial court erred by applying the same evidentiary standards to each of her three claims. [contract, fiduciary duty, negligence] Appellant is, of course, correct that a breach of fiduciary duty is a species of tort distinct from a cause of action for professional negligence. Barbara A.v.John G. (1983)145 Cal App.3d 369, 382-383.. i.Budd v. Nixson (1971) 6 Cal.3d 195, 200]"

4. It was deemed plaintiffs failed in "calling an expert witness to testify regarding defendant's alleged **breach of the standard of care.**" (App 14)

(1) Vos an expert of this federal law and practice, also has the personal knowledge of the case, was not allowed to be called as witness during the presentation of evidence, (RT 537:12-544), in violation of Calif Evid Code §776(a) "A party to the record of any civil action, or a person identified with such a party, may be called and examined as if under cross-examination by any adverse party at any time during the presentation of evidence by the party calling the witness."

(2) It was held in *Mirabito v. Liccardo* (1992) 4 Cal App 4th 41, 47 of the same Division Two of the First Appellate District of this instant case. "Where the rules of professional conduct provide the standard by which an attorney's breach of his or her fiduciary duty is measured."

(3) It is held the Loss of the opportunity of his client was below the stand of care in *Smith v. Lewis* (1975) 13 Ca 3d 349; *Stanlety v. Richmond* (1995) 35 Cal App 4th 1070, of the same Division Two

of the First Appellate District of the instant case.

5. It was deemed "Expert testimony is needed **to decide elements of professional negligence"** (App 15). But the primary issue in the trial, contract was disregarded. "The question of interpretation of contract is for the jury and the question of legal effect is for the judge." *Loeb v. Hammond* 407 F.2d 779 (7th Cir 1969) not the expert witness.

The numerous blatant and egregious violations of his responsibility were not merely breaches of legal technicalities for which expert testimony is required. Expert testimony is not required. "Where attorney's performance is so clearly contrary to established standards, as here, that trier of fact would find professional negligence without expert testimony." *Day v. Rosenthal* (1985)170 Cal App 3d 1125, 1146 cert den 475 U.S.1048.

6. It was deemed expert testimony is needed to form **breach of "duty of competent representation"** in the **"specialized field of law."**(App 15) But

(1) The judge barred the evidence of the sources of his duties: fee agreement of chapter 11 counsel, the required order of employment by the estate and Court Orders he failed to obey. (2)Violation of law, bankruptcy code and rules, and the negligence per se doctrine, which expert witness is not required, Calif Evid code §669 was completely disregarded. (App 21)

7. The pertinent part of the citation was ignored in order to force the issue on the requirement of expert witness. (App 16) "When a malpractice action is brought against an attorney holding himself out as a legal specialist and the claim against the attorney related to his expertise," **ignored:** "where the failure of attorney performance is so clear that a trier of fact may find

professional negligence unassisted by expert testimony." *Wright v. Williams* (1975) 47 Cal App 3d 802 810 *Kirsch v. Duryea* (1978) 21 Cal 3d 303 311 *Wilkinson v. Rives* (1981) 116 CalApp 3d 641 647-8.

8. Twice court was moved to appoint an expert witness both were declined by the court. (RT 414:7-12, 464:6-467:21).

9. The jury trial certainly was a mockery.

(1) The evidences of his failures were barred, at the wish of the defendant, (RT 384, 476) over the objection, such as Fee Examination [Page 8] (RT 537:12-544), the incomplete petition papers filed, and the filing of a blank Schedule H (App 22, 26) in concealment. Most of them are certified documents.

(2) We were not allowed to testify, for it was deemed to be argument, and **not even allowed to read the evidence, it was deemed to be the duty of an expert witness.** It might as well to have anyone from the street to testify as the witness, or the case might as well be dismissed. (RT 254:4-255:13)

(3) Expert attorney witness deemed to be required on the law and apply the fact to the law. Trial court erred in his exclusive province. Expert is called simply to give an opinion on the applicable law, he should be excluded as intruding on the Judge's role *CMI-Trading, Inc. v. Quantum Air, Inc.* 98 F.3d 887 (6th Cir 1996) **There was no record** of the judge that he ever took the initial determination reserved solely for the court whether attorney erred. **No record** of the jury was instructed by the judge on the general principles of law governing the case, or the theories that were supported by the pleading and the evidence; **No record** of Jury's question on the basic bankruptcy such as the automatic stay (RT 433: 18-434:13 was ever answered by the judge. **No record** of

Bankruptcy Rules, Codes, authorities, State Bar Rules presented to the court were ever read, explained to the jury by the judge;

(4) Typical response of the court on the law were: "denied" "we're not going to go into §362 right now" (RT 369:9; 433:18); Rule 1007, 15 days to file. "I will notice it" But he never did. Rule 7062, 8002(b), 10 day to appeal, "I told you before that was denied, I'm not." (RT 337:26). Even with the expert witness attorney it is for the judge not the lawyers or the witnesses, to inform the jury of the law applicable in the case and to decide any purely legal issue. *Nieves-Villanueva v. Soto-Rivera* 133 F.3d 92 (1st Cir 1997)

(5) All the motion in limine for judicial notices requested on law, authorities Professional Rules and Business Codes were consistently barred (App 20). As for here attorney's conduct were violations of professional standards; standards which the trial court had the duty to notice, Evid Code §451(c). *Day v. Rosenthal* (1985), 170 Cal App 3d 1125, 1147, cert den 475 U.S. 1048. *Mirabito v. Liccardo* (1992) 4 Cal App 4th 41, of the same Division Two of the First Appellate District of this instant case.

(6) It even ruled against motion (App 20) to give a jury instruction based on the rules of professional conduct, which is held entirely proper, in *Mirabito v. Liccardo* (1992) 4 Cal App 4th 41, 46, of the same Division Two of the First Appellant District, *Day v. Rosenthal* (1985) 170 Cal App 3d at 1147. The court never intended, as the record shows, to have the jury to exercise their duty, since it had failed its duty toward the jury to inform jury of law applicable in the case.

"it was still resolvable by common knowledge." as held in *Ball v. Posey* 176 Cal App 3d 1209, 1215 (First District Div Four 1986) "All the

facts were before the jury, ... the correct rule on the necessity of expert testimony has been summarized by Bob Dylan: 'You don't need a weatherman to know which way the wind blows.'" "Appellate Courts have repeatedly held that expert testimony is unnecessary to a plaintiff's case where the fact sought to be proved is one within the general knowledge of laymen." *Carson v. facilities development Co.* 36 Cal.3d 830, 845 (1984)

"We believe that respondent's negligence was so clear that the testimony of a bankruptcy expert was not needed. Respondent's conduct demonstrates a total failure to perform....." *Goebel v. Lauderdale* (1989) 214 Cal App.3d 1502, 1508.

But this jury was dismissed.

The court was not interested in the justice how would it be interested in the law and truth -- the fact. But claiming those are of expert witness.

Federal issues necessarily related to the causes of action were not adjudicated as foretold.

IV. Appellate Court

All the errors and prejudicial acts in trial court were completely preserved due to our "lack of legal training," or was excused because of our language deficiency, "making it difficult to discern precisely what they are arguing" (App 6).

Opening and Reply briefs detailed the federal issues with the evidences in support of the violations were totally disregarded.

It even has the same error on the citations, "The failure of his performance is so clear that a trier of fact may find professional negligence unassisted by expert testimony." (App 8) was also omitted.

Trial court's error in combining all the causes of action under negligence was preserved, in

contrary to its own established authorities of the same two judges of Division Two of the First Appellate District.

The four falsified letters of the defendant (pp. 11-14), were used for the entire judgment (App 2f, 6f). Therefore it conveniently mixed-up the basic federal issues: (1) The right to submit the plan of reorganization, granted to a debtor who has filed the chapter 11, under the federal law; (2) Usurpation of the jurisdiction of the federal court in depriving his clients' rehabilitation right, in deference to the adverse interest in violation of law; (3) Duty of the chapter 11 counsel.

The judgment did cite: "Section 11 U.S.C. 1101-1174 ('Chapter 11') is to provide a debtor with legal protection in order to give it the opportunity to reorganize,..... " (APP 3). **But it failed to** find out how, why and what made us, the debtors to loss our protection and the opportunity to reorganize in the underlying case represented by Vos

Six stages of chapter 11 proceeding were cited. **But it failed to** acknowledge ours was failed at the very first "(1) getting the debtor into bankruptcy," (APP 3), a required schedule was missing in the complete papers filed in direct attack of stay.

The judgment denied solution on a federal issues for the state causes of action. It makes one wonder why there is need for the courts, the judicial system or the law. For the judges failed to carry out their duties as a judge and even violated the law "in the name of the law" in order not to enforce the law.

REASONS FOR GRANTING THE PETITION

It is believed strong interest this Court has in maintaining the quality of justice provided by the court, and promoting justice and the appearance of justice in the eyes of the public. *Professional Responsibility, Collier on Bankruptcy* Matthew Bender & Co. 12/96. ¶8.02[2]. Such program "Justice For Sale" of Bill Moyers, his interview with Justices Kennedy and Breyer on Nov 23rd, 1999, manifests the deep concern of this highest court of the nation of the quality of judicial system.

I. The bankruptcy system was easily dismantled by the attorneys in the underlying chapter 11 case.

Attorney in the bankruptcy system "plays a central role to the administration of the bankruptcy estate," *Collier on Bankruptcy* ¶8.01[2].

> Attorney is an "officer of the court.... The term points out that the integrity of the judicial process in any court depends to a large extent on the veracity and integrity of the attorneys who practice before it. Absent the trust those virtues inspire, the system cannot function." citation omitted. *Collier on Bankruptcy* at ¶8.01[3][b]

"Attorney when practicing before the bankruptcy court, must not only concern themselves with the application of state ethical rules, but they must also adhere to obligations set out in the bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and other relevant titles of the United States Code with specifically impose ethical obligations ... which may apply as well. *Professional*

Responsibility, Collier on Bankruptcy at ¶8.01[4]

Bankruptcy Act, §301 et seq., 11 U.S.C. §701 et seq. states: "In the context of a chapter XI proceeding in which the debtor's counsel acts as a fiduciary, it is especially necessary to hold counsel to a high standard in the discharge of his or her duties."

1. **Where as here, respondent, the attorney, not only has failed his duties** of competence, diligence and loyalty as well as a duty to exercise independent professional judgment, as in any client representation, appearing for a party in interest in the bankruptcy court." *Collier on Bankruptcy* at ¶8.01[3] In joint acts with the creditors the adverse interest, **defendants of the related case,** used the bankruptcy code, rules and fraudulently altered orders as the tools, violated the constitution and the law for which they suppose to support, usurping of the power of the court and openly deceived the judge in court.

(1) The central policy of the bankruptcy system, has always been concerned by this Court was defeated. Namely, "The due administration of the bankruptcy court, the equality of distribution among creditor." *Begier v. IRS* 496 U.S. 53, 58 (1990). "[a]n overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction." *Bank of Marin v. John M. England, Trustee in Bankruptcy* 385 U.S. 99, 103 (1966).

(2) The debtors' legal, equitable and possessory interest in property and rehabilitation right was removed, *U. S. v. Grant* 971 F.2d 799 805 (1st Cir 1992) without the knowledge of the court.

This Court has stated: "The reorganization effort would have no chance of success, if property essential to running the business were excluded

from the estate." United States v. Whiting Pools, Inc. 462 U.S. 204 (1983) Ours had been removed from the jurisdiction of the court before the missing schedule H of the complete papers, was filed (App 22, 26) by the respondent.

This Court also has stated: "The trustee or debtor-in-possession is authorized to manage the property of the estate and to continue the operation of the business." "Until the business can be reorganized pursuant to a plan under 11 U.S.C. §§1121-1129. *United States v. Whiting Pools, Inc.* 462 U. S. 198, 203 (1993). Ours, before the opportunity to put forward a plan, we and the tenant had been evicted twice, and business had been inventoried. Through the mercy of the court, fire sale was granted.

(3) "[T]he provisions of Title 11 of the bankruptcy law are defeated when a person without court approval acts in a manner that diminishes the estate of the debtor, and thus interferes with the equitable use of distribution [of the court] of any material part of the assets of the estate." *U.S. v. Cardall* 885 F.2d 656, 678 (9th Cir 1989).

Therefore, chapter 11 was defeated, which also is a crime. "[a]lmost all of the crimes require the commencement of a case under title 11." *Bankruptcy Crime, Collier on Bankruptcy* at ¶7.01[1][b].

(a) The provision of §362(a) automatic stay, has been described as "one of the fundamental debtor protections provided by the bankruptcy laws." *Midlantic Nat. Bank v. New Jersey D.E.P.* 474 U.S. 494 503 (1986), was intentional violated twice, by causing the case to be dismissed twice. §362(a) "operates as a stay, applicable to all entities, of...(3) any act to

obtain possession of property of the estate or ...to exercise control over property of the estate;" "Whether judicial or private, that seek possession of property of estate." *Collier On Bankruptcy* at ¶362, 03[5]. It is punishable under §362(h). "Violation of the automatic stay strikes at the heart of the bankruptcy code's mechanisms for debtors rehabilitation and for equity amongst creditors;" *In re Cafe Partners/ Washington 1983,* 81 B.R. 175 (Bkrtcy D. Dis Col 1988)

(b) The failure started at the inception of the case. He entered the contract with fraudulent intend of not to perform. It was not merely the incomplete petition filed which caused the first dismissal, of which preparer is punishable under §303(i). A defective petition filed in violation of Rule 3003.

Twice Rules 7062, 8002(b) were violated, for failure to revive the case in 15 days twice.

Failure to file required Motion under §363, even after he had been ordered by the court (App 30) as a condition of stay.

Failure to assist the plan, disclosure statement, and other duties required under the law as the chapter 11 counsel under the contract.

Abandonment, considered by the court, termination of employment without the statutory requirements under §554 (a)(b).

Defalcation while acting in a fiduciary capacity §523(a)(4), willful and malicious injury, conscious disregard to the consequences to his clients §523(a)(6). Intended the consequences of the acts, not simply the act itself of negligent or reckless, "formulation triggered in the lawyer's mind intentional tort, as distinguished from negligent or reckless torts." *Kawaauhau v. Geiger*

523 U.S. 57, 61 140 L.E 2d 90.
Concealing of the violations of procedural due processes, "Concealment is an all-encompassing term. It not only covers the nondisclosure of that which must be disclosed, but also covers the nondisclosure of that which may be independently illegal." *Collier on Bankruptcy* at ¶7.02[1][b] of *Relevant and sufficient evidence for concealment case* U.S. Mail was used repeatedly in furtherance of their plan. The four falsified letters manufactured have been used as his defense. (pp.11-14)

II. State system. There was no "perception" nor "reality of maintaining a proper trial."
One: the courts operated without "the bound of the law" and its own authorities. Two: we, the people were not treated equally. And three: our right -- due process was violated repeatedly. Borrowing from Justice Kennedy's statement of the interview with Bill Moyers. The dismissal of the instant case for "lack of expert witness" was merely a guise, in granting the immunity to a former colleague of his pattern of violations of oath and duties of an attorney, [Business & Professional code §§6107, 6108] toward his clients and the federal court.

Otherwise, "[t]he issue was simply whether a law firm abandoned a client's best interests in deference to the conflicting interests. The proof on that issue was clear in its inculpatory impact and spoke for itself without the aid of expert opinion. *Betts v. Allstate Ins. Co.* (1984) 154 Cal App 3d 688.

Certainly Judge Peter Allen Smith, the first trial judge, now has resumed his retirement, was a marvelous one, who made the judicial system respectful, deservs our respect.

CONCLUSION

After the unexpected distress sales in the underlying bankruptcy chapter 11, we the petitioners pro se, have no money for an attorney. Our petition is poorly done, limited with the knowledge of law, deficient in language.

We also suffered alarmingly through the rotten judicial experiences in the state courts. No wonder there was such a program called "Justice For Sale". Ours was "Justice System for Sale"!!

Whether this highest Court of the nation would grant the petition for a writ of certiorari is whether this Court really has interest in maintaining the quality of bankruptcy court, a federal system, promoting justice and the appearance of justice in the eyes of the public.

Or let the bankruptcy system -- law and court -- be existed merely in the name only , and be rotten by the same attorneys who contaminated the state courts, without the knowledge of the federal court. Let the unknowledgeable debtors, the public to go through like what we did, be suffered in their own attorneys' hand while acting in fiduciary capacity, and forget the mandate of the Congress.

Very respectfully submitted.

Dated: May 16, 2000.

Joseph N. Y. Tsu
Petitioner pro se

Cecilia W. Tsu
Petitioner pro se

213 Cleveland Court
Mill Valley, Ca 94941
(415) 388-3862

Not to be Published in Official Report

In the court of Appeal of the State of California
First Appellate District
Division Two

FILED
NOV 22, 1999

JOSEPH N.Y.TSU et al., Plaintiffs and Appellants,
v.
JOHN A. VOS et al., Defendants and Respondents.

A083034

(Marin county Super.Ct.No. 162817)

I. INTRODUCTION

A jury trial was held in this legal malpractice lawsuit brought by appellants Joseph N.Y. Tsu and his wife Cecilia W. Tsu (the Tsus). against respondents, their former attorney, John A. Vos, doing business as the Law Offices of John A. Vos (hereafter Vos). The Tsus alleged Vos committed numerous errors and omissions when he represented them during their Chapter 11 bankruptcy proceedings. At the close of the Tsus' evidence, the trial court granted Vos's motion for nonsuit on the ground that the Tsus failed to present any expert testimony to establish the applicable standard of **care,** Vos's breach thereof, and a causal link between the breach of the standard of care and an adverse result. (See Code Civ. Proc., §581c.)

We affirm the trial court's grant of nonsuit and the entry of judgment in Vos's favor. Contrary to the Tsus' appellate arguments, which are made in propria persona, their claims of legal malpractice do not involve a simple dereliction of duty so palp

able as to be apparent without the presentation of expert testimony. Rather, the Tsus' claims involved allegations of professional negligence in the highly technical and specialized field of bankruptcy litigation. Under these circumstance, the Tsus' failure to secure expert testimony to support their claims, after repeated warnings of the necessity to do so, gave the trial court no choice but to grant a judgment of nonsuit on behalf of Vos.

II. FACTS AND PROCEDURAL HISTORY

We provide a brief chronology of the pertinent events that serve as the basis of the Tsus' lawsuit. In 1986, the Tsus built a Chinese restaurant, Dynasty Fantasy, utilizing a construction loan from Tracy Federal Bank (Tracy Federal), in the initial principal amount of $550,000. The loan by Tracy Federal was secured by two pieces of property on Geary Boulevard in San Francisco owned by the Tsus--the Dynasty Fantasy restaurant at 6147 Geary,and a commercial building at 6125-27Geary.

The Dynasty Fantasy was not profitable, and the Tsus defaulted on their obligation to Tracy Federal. On November 18, 1992, Tracy Federal filed a "Notice of Default and Election to Sell Under Deed of Trust," stating that the past due payments, plus permitted costs and expenses, equaled $149,418.97. After paying Tracy Federal $30,000 to postponed the foreclosure for several months, the foreclosure sale was ultimately set for late July 1993.

On July 21, 1993, several days before the scheduled foreclosure sale, the Tsus retained Vos to prevent, if possible, the imminent foreclosure. The Tsus selected Vos based on an advertisement in the telephone book yellow pages, indicating he

had expertise in bankruptcy law and business reorganization. On July 23, 1993, Vos filed a "Voluntary Petition for Chapter 11 Bankruptcy" on the Tsus' behalf. "The purpose of section 11U.S.C. 1101-1174 ('Chapter 11') is to provide a debtor with legal protection in order to give it the opportunity to reorganize, and thereby to provide creditors with going-concern value rather than the possibility of a more meager satisfaction through liquidation." (In re The Gibson Group, Inc (9th Cir 1995) 66 F.3d 1436, 1442.) "A Chapter 11 case involving a business will typically have the following states: **(1)** getting the debtor into bankruptcy, **(2)** operating the business, **(3)** formulating a plan of rehabilitation, **(4)** creditor acceptance of the plan, **(5)** court confirmation of the plan, **(6)** discharge as a result of confirmation, and payments under the plan." (1 Epstein Nickles & White, Bankruptcy: Practitioner Treatise Series (1992) §§1-9, p.14.)

On August 20, 1993, the Bankruptcy court dismissed the Tsus' bankruptcy case through a clerical error. Vos was successful in moving the court to reinstate the Chapter 11 proceeding, and an order vacating the erroneous dismissal order was filed on September 27, 1993.

On November 9, 1993, a meeting with the bankruptcy trustee was held, and the case was proceeding along its normal course. Vos, on numerous occasions, write the Tsus letters to inform them of their obligations under Chapter 11 to account both to the trustee and to their creditors regarding income from the restaurant, and to formulate a plan for reorganization. Following the filing of the chapter 11 case, the Tsus continued to lose money in the operation of their business and

Vos began to warn the Tsus that a successful Chapter 11 reorganization looked unlikely given their continuing operating losses, as well as the ever increasing debt to Tracy Federal.

On November 16, 1993, Tracy Federal moved the bankruptcy court for an order to lift the automatic stay and allow foreclosure on Geary Boulevard properties. Vos opposed the motion. At the hearing held December 6, 1993, the court denied Tracy Federal's motion and ordered the Tsus to provide an accounting, prepare a reorganization plan and begin making timely payments to Tracy Federal. Following the hearing, Vos wrote the Tsus outlining the obligations imposed by the Bankruptcy court's order. The letter stated that in light of the Tsus' delay in formulating a reorganization plan and the losses contained in the Tsus' monthly operating reports, "you will be hard-pressed [*sic*] to confirm a chapter 11 Reorganization Plan." Vos then went on to state, "On the other hand, perhaps you would prefer to have your Chapter 11 case dismissed. In that event your other investment property, personal home, and Mercedes-Benz automobile may be kept from the clutches of your creditors." With reference to an upcoming status conference scheduled for early January 1994, Vos wrote: "Please let me know whether you want me to appear at that time, as unless I hear from you I shall assume that you prefer dismissal of the present proceedings."

Although a status conference was scheduled for January 7, 1994, Vos did not appear at the hearing. On January 21, 1994, the Court dismissed the Chapter 11 proceeding. Shortly thereafter, the Tsus, acting in propria persona, made phone calls wrote letter, and filed motions asking that the order

dismissing the Chapter 11 proceeding be vacated.

In late January 1994, the Tsus retained another attorney, James Mori, to represent them in this matter. On February 22, 1994, Mori filed a motion to vacate order of dismissal on behalf of the Tsus. On April 29, 1994, the bankruptcy court reinstated the Chapter 11 proceeding and effectively granted the Tsus an additional six-month period in which to sell the two properties. The Tsus ultimately sold the properties, paid off Tracy Federal, and retained the remaining equity from the sale of the restaurant.

On January 18, 1995, the Tsus filed suit against Vos alleging causes of action for breach of ontract, breach of fiduciary duty, negligence, and intentional infliction of emotional distress. The matter proceeded to a jury trial with the Tsus representing themselves propria persona. The Tsus presented evidence purporting to show Vos committed numerous professional errors during their chapter 11 bankruptcy proceeding, including failure to make necessary filing, failure to apprise them of the applicable requirements and rules, failure to communicate with them about the status of the case, and failure to attend the necessary court hearing and other proceedings. The Tsus contended that the harm they suffered as a result of Vos's inadequate representation was less financially favorable reorganization resulting in their real property being sold at a diminished value. In essence, they claim that Vos's acts and omissions caused them to recover less equity and retain fewer assets than if he had competently represented the.

The matter proceeded to a jury trial, with the issue of liability bifurcated from the issue of damages. during pretrial proceedings, the court

made a prophetic statement directed at the Tsus: "Without an expert as to what a lawyer-the standard of care of a lawyer, if you don't have an expert for that, I'm warning you, it's going to be very, very difficult to prove. It's going to be vwery, very difficult to prove that it's self-evident to a layman that what the lawyer did, and the resulting cause of what he did, were so self-evident that even a layman could understand."

At the close of the Tsus' evidence attempting to establish liability--consisting exclusively of the narrative testimony by Cecilia Tsu--Vos moved for a judgment of nonsuit. The trial court granted the motion and entered judgment in vos's favor. This appeal followed.[1] [1] Pervading this proceeding, at both the trial and appellate levels, is the Tsus' decision to represent themselves. The presentation of their case is hampered by their apparent lack of legal training, making it difficult to discern precisely what they are arguing. We have taken substantial liberty in paraphrasing and consolidating what we believe to be their major arguments; and in doing so, have done our best to accurately characterize their position in this matter.

III.
DISCUSSION

"A defendant is entitle to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff if insufficient to permit a jury to find in his favor. [Citation.]" (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291; see also *Campbell v. General Motor corp.* (1982) 32 Cal.3d 112, 117-18.) On appeal, we will reverse a grant of nonsuit, "'unless interpreting the evidence most favorable to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff a judgment for the

defendant is required as a matter of law.'" (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 839 (Carson), quoting *Mason v. Peaslee* (1959) 173 Cal.App.2d 587,588.)"Only the grounds specified by the moving party in support of its motion should be considered by the appellate court in reviewing a judgment of nonsuit. [Citations.] (*Carson, supra,* 36 Cal3d at p. 839.)

To prove their claim for professional negligence, the Tsus had to present substantial evidence of each of the following elements "..... '[O]ne, the duty of the professional to use such skill, prudence and diligence as other members of his profession commonly possess and exercise. Two, a breach of that duty. Three, a legal causal connection between the negligent conduct and the resulting injury. And four, actual loss or damage resulting from the professional's negligence.'" (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 413, fn.21.) In moving for nonsuit, Vos asserted the Tsus had failed to introduce evidence sufficient to establish either the standard of care, breach thereof, or causation. He argued that expert testimony was necessary to establish the parameters of acceptable professional conduct. The reason for the necessity of expert testimony was simply that the jury could not rationally apply negligence principles to professional conduct absent evidence of what a competent lawyer would have done under similar circumstances, and the jury should not be permitted to speculate about what the standard in the profession may be. In opposing the motion for nonsuit, the Tsus contended that under the facts of this case Vos's "conduct is so egregious, so obvious," expert testimony was not required to establish a breach of duty.

The court in Wright v. Williams (1975) 47 Cal. App.3d 802, 810-811, enunciated the following rules: Where "the malpractice action is brought against an attorney, holding himself out as a legal specialist and the claim against him is related to his expertise as such, then only a person knowledgeable in the specialty can defined the applicable duty of care and opine whether it was met. [Citation.]" (See also Kirsch v. Duryea (1978) 21 Cal.3d 303,311; Wilkinson v. Rives (1981) 116 Cal.App.3d 641, 647-48; *Conley v. Lieber* (1978) 97 Cal.App.3d 646, 658; *Lipscomb v. Krause* (1978) 87.App.3d 970, 976.)

Nevertheless, the Tsus point out that where the record discloses an obvious and explicit breach of an attorney's duty of care, such as letting the statute of limitation run, expert testimony as to the applicable standard of care will not be required. (See, e.g., *Stanley v. Richmond* (1995) 35 Cal. App.4th 1070, 1093-1095 [failure to perform standard legal research on property division in dissolution action]; *Day v. Rosenthal* (1985) 170 Cal. All.3d 1125 [misappropriation of client funds].) The tests developed in these cases suggest that, under California law, expert testimony is required as an element of proof in any but the very simplest professional malpractice cases.

In an attempt to bring their case within the exception rather than the general rule, the Tsus contend that the issue of Vos's negligence was so obvious that the jury needed no expert assistance to conclude Vos's claim: "[W]e trusted the defendant to stop the foreclosure and to correct the errors by means of the bankruptcy. He accomplished none [*sic*]. He step by step deliberately install the means for the lender to repossess our

properties with our business in it [*sic*]. Yes, He successes in ruin our livelihood [*sic*], and the security of our old age ....[¶]In this civilized society, such conduct like this is unacceptable." The evidence and argument presented by the Tsus in their case-in-chief and in their appellate briefs present, at best, mixed issues of alleged ethical violations, assertions of attorney abandonment, and contentions that Vos failed to properly advise the Tsus about their responsibilities as Chapter 11 debtors.

However, a look at Vos's position in this case reveals that the Tsus have vastly oversimplified the matters at issue between the parties. Vos contends his actions were in compliance with prevailing standards of legal practice in handling bankruptcies and that no conduct on his part caused the Tsus any damages. Specifically, Vos contends: "From all of the evidence obtained in the case to date, it is clear that the [Tsus] had no realistic plan for reorganization, and were ultimately going to have to come to grips with the sale of the restaurant, which is exactly what ultimately happened in the Chapter 11 proceeding." In addition, Vos claimed the Tsus received fair market value for the Dynasty Fantasy when they ultimately sold the pro perty in July 1994. Accordingly, they were not harmed by any aspect of his representation. Vos's assertion that his professional conduct comported with that ordinarily exercised by attorneys specializing in bankruptcy, was supported by the proffer of an expert witness, retired United States Bankruptcy Judge, who was prepared to attest to Vos's professional competence in handling the Tsus'case.

The trial court, having heard the Tsus' case-in-chief, concluded that the dispositive issues were sufficiently complex so that the applicable stand-

ard of care and breach thereof must be established by expert testimony. we agree. Although the Tsus' action had been on file for approximately three years, and although theTsus were repeatedly warned by the court at every stage of these proceedings of the necessity of expert testimony in order to prevail, the Tsus failed to secure the expert testimony necessary to support their claim. Without the testimony of an expert in bankruptcy law, the lay jury could not possibly be expected to understand the specialized bankruptcy litigation strategy and decisions may by Vos, the local bankruptcy court practices, or all of the other myriad issues which governed Vos' handling of the Tsus' chapter 11 reorganization. The dispositive issues in this case were rendered more complicated by the fact that the Tsus were able to obtain replacement counsel and were allowed to continue in their attempts to reorganize under Chapter 11 after Vos no longer representing them. Given that the ultimate determination of the issues presented by this case was beyond the knowledge and expertise of the average layperson--and probably beyond the knowledge and expertise of most lawyers--the law required expert testimony be employed. In the absence of expert testimony, the trial court properly granted the motion for nonsuit.

The Tsus argue that, notwithstanding the lack of expert testimony to support their claims based on professional negligence, the trial court erred in not allowing their other claims to proceed. Looking to both the Tsus' complaint and to the arguments they made at trial, it appears the Tsus wish to assert claims based on Vos's alleged breach of his fiduciary and contractual duty as well as claims based on fraud and infliction of emotional distress.

When the Tsus were called upon to articulate the facts supporting these theories of liability, they simply restated the duties of care and loyalty that attorneys generally owned to their clients. With the case in this posture, the Tsus faced formidable obstacles, since the proof of "intend to defraud" or "outrageous conduct" would place a much greater burden on the Tsus than proof of malpractice. Consequently, we find the trial court did not err in concluding the remaining causes of action were subsumed in the Tsus' malpractice claim.

Whether a complaint is based on tort or breach of contract, "the liability of an attorney for failure to properly perform his duties is governed by the [same] general standard of care ...[citation.]" (*Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 147; see *Kirsch v. Duryea,* supra 21 Cal.3d at 308 [principles governing attorney liability"are equally applicable whether the plaintiff's claim is based on tort or breach of contract.").] We further note: "The breach of the fiduciary obligations,sometimes characterized as 'constructive' fraud, has been appropriately recognized as an action in tort, not contract. The tort constitutes a wrong which is distinct and independent from professional negligence but still [comprises] legal malpractice." (1 Mallen & Smith, Legal Malpractice (3d ed. 1989) ch.11, §11.1, p.633, fns. deleted, as quoted in *Buehler v. Sbardellati* (1995) 34 Cal.App.4th 1527, 1544, fn. 9; accord *Mosier v. Southern Cal Physicians Ins. Exchange* (1998) 63 Cal.App.4th 1022,1043-1044.)

Consequently, the Tsus failed to make out a claim under these various tort and contract theories for the same reason they failed to make out a claim of professional negligence--they did not offer the expert testimony needed to define the standard of

care for bankruptcy attorneys in order for the jury to determine whether Vos's representation deviated from those standards. *Accordingly, the trial court* did not err in granting nonsuit with respect to all of the Tsus' claims.

The Tsus claim that, in addition to wrongfully granting nonsuit, the trial court improperly denied their motion, made in the midst of trial, to amend their complaint and add additional claim based on fraud and conspiracy. The Tsus however, did not offer any plausible explanation for failing to seek an earlier amendment to their complaint. Motion for leave to amend are directed to the sound discretion of the trial court. (Code Civ. Proc.,§473, subd. (a)(1).) Although public policy favors liberally granting leave to amend,it is well settled that when an order denying leave to amend is attacked on appeal, the discretion of the trial judge will be upheld unless abuse is clearly shown. (*Dos Pueblos Ranch & Imp. Co. v. Ellis* (1937) 8 Cal.2d 617,622; *Ross v. McDougal* (1939) 31 Cal.App.2d 114, 121.)

If the party seeking leave to amend has been dilatory and the delay has prejudiced the opposing party, the trial court has discretion to deny the motion. There is prejudice when the amendment would require delaying the trial, resulting in added costs of preparation or an increased burden of discovery. (See *Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 486-488; *Green v. Rancho Santa Margarita Mortgage Co.* (1994) 28 Cal.App.4th 686, 692-694.) No abuse of discretion has been shown.

DISPOSITION

The judgment is affirmed. (Blank) Ruvolo, J.

We concur:

(Blank) Kline, P.J. (Blank) Haerle, J.

COURT OF APPEAL,

FIRST APPELLATE DISTRICT

350 McAllister Street San Francisco, Ca 94102

DIVISION 2

JOSEPH N.Y.TSU et al.,
Plaintiffs and Appellants,
v.
JOHN A. VOS
Defendants and Respondents.

FILED
Court of Appeal
First Dist
DEC 20, 1999

A083034
Marin county No. 162817

BY THE COURT:

The petition for rehearing is denied.

Dated: Dec 20, 1999 "s/Kline, P.J.(seal)"

REPORTER'S TRANSCRIPT ON APPEAL
Before: Hon. William T. McGivern, Judge
Date: Friday, March 6, 1998 CaseNo.: A083034
Subject: Court order & judgment of granting defendants' motion of nonsuit
Volume: VI, Pages: 508-583

The Court: Let the record show that parties, the plaintiffs representing themselves are presented, and defendant with his counsel are present in court. Submitted? For this hearing of this motion, this case involves an alleged breach of professional duties owned by an attorney to a client. And attempt of his responsibilities regarding the client in a proceedin -- United States Bankruptcy Code -- The matter was eventually -- did proceed in the United States Bankruptcy Court for the Northern District of California.

At the completion of plaintiffs' case in chief, defendant has moved, under Section 581(c) of the California Code of Civil Procedure, for a non-suit.

As such, this court accepts all of the evidence presented by plaintiffs as true, and the reasonable inference favorable to plaintiffs in rulin on the motion. Court also notes that plaintiffs have stated on the record that they have presented all their evidence regarding the acts by the defendant.

Plaintiffs have rested without calling an expert witness to testify regarding defendant's alleged breach of the standard of care owned by a bankruptcy attorney to his or her clients.

This court also finds that further non-expert testimony on behalf of plaintiffs would be cumulative under Section 352 of the California Evidence Code; that the Court, in its discretion, may exclude evidence if its probative value is substantially out

weighted by the probability that its admission will, A, necessitate undue consumption of time or, (B), create substantial damage of undue prejudice or of confusing the jury or misleading the jury.

Plaintiffs have alleged that defendant is an attorney who is a specialist in bankruptcy practice, and that he breached his duty, duty of competent representation. Although breach was the proximate cause of damages to theplaintiffs. Bankruptcy practice is a specialized field of law. Expert testimony is need to decide elements of professional negligence in this area. [*Plaintiff's did not present any expert testimony even though they were told by one prior judge who presided over this case that they needed anattorney and by two subsequent judges presiding over the case,*]
*Contrary to the fact, was stricken out, please see below.

including this court, that an expert would be necessary to prove a prima facie case. Now, Lipscom vs Crouse, 87 Cal.App.3d, 970, parenthesis, (1978), close parenthesis, comma; K-i-r-c-h- vs Dys, D-y-a, 21 Cal.3d, 303 (1978), that's in parenthesis; and Wright, W-r-i-g-h-t, vs Williams, 47 CalApp.3d, 802, (1975), the defendants motion for non-suit is granted, comma, and judgment is entered for the defendants.... Court's is recess.
Ms. Tsu: Could I ask a question? The Court: Yes.
Ms. Tsu: You say the prior judge has instruct the plaintiff to have expert attorney. That's not correct. Because the prior judge only one talking about expert attorney is Judge Allen Smith.
The Court: That's what I said.
Ms. Tsu: Allen Smith only say he would like to wait and see the case, and he never made a conclusion of that.
The Court: * I will amend. I will amend my order.

I will amend my order. the last paragraph, starting with, "Plaintiffs did not present any expert testimony," shall read as follows: Plaintiffs did not present any expert testimony, even though they were told by this court on expert testimony would be necessary to prove a prima facie case." Period.
I have stricken the part that says two prior judges had told you that, "told on several occasion by this court." I think, if we o back through the record, we'd find there was -- there were some warnings given to you about beving expert testimony.
Ms. Tsu: And I have another question. ....
The Court: That's the order of the Court. The court is in recess. The Court is going to call the jury back and jury. and I think, out of courtesy to the jury, both parties should remain here.
The Court: Counsel, I presume defense counse, when you prepare the papers that I've ordered that you prepare for the Court, when you submit them to the Court, you'll submit them to your opposition? Mr. Reiser: Absolutely.

MICHAEL J. REISER, ESQ Bar No. (133621) DATE FILED
Rankin, Sproat, Mires, Trapani & Reiser APR 03 1998
1800 Harrison Street, Suite 1616 Marin county courts
Oakland, Ca 94604 (510) 465-3922
Atty for Def, John A. vos, Law Office of John A. Vos

SUPERIOR COURT OF CALIF, COUNTY OF MARIN

JOSEPH N.Y.TSU et al., No.162817
Plaintiffs and Appellants,
vs ORDER GRANTING
JOHN A. VOS, LAW OFFICES DEFENDANTS'
OF JOHN A. VOS, and DOES MOTION FOR
1 through 10 NONSUIT
Defendants and Respondents / Date:March 6,1998

The Motion of defendants, JOHN A. VOS and LAW OFFICES OF JOHN A . VOS, for Order Granting Defendants' Motion for Non-Suit following the completion of Plaintiffs' case after the commencement of Trial [which began on February 18, 1998], came on for hearing on March 6, 1998 before the Honorable William McGivern, presiding in Department IIA. PLAINTIFFS, JOSEPH TSU and CECILIA TSU, appeared in pro per; defendants, JOHN A. VOS and LAW OFFICE OF JOHN A. VOS, appeared along with their counsel, MICHAEL J. REISER.

Upon proof being made to the satisfaction of the Court and good cause appearing therefor;

IT IS ORDERED that Defendants' Motion for Nonsuit in the above matter is granted; and that the Matter is hereby dismissed with prejudice.

Dated: Mar 20, 1998 William McGivern, Jr (seal)

THE HONORABLE WILLIAM MCGIVERN
JUDGE OF THE SUPERIOR COURT

MICHAEL J. REISER, ESQ Bar No. (133621)
Rankin, Sproat, Mires, Trapani & Reiser
1800 Harrison Street, Suite 1616
Oakland, Ca 94604 (510) 465-3922
Atty for Defendants John A. vos, Law Office of John A. vos

FILED
APR 03 1998
Marin county Courts

SUPERIOR COURT OF CALIF, COUNTY OF MARIN

JOSEPH N.Y.TSU et al.,
Plaintiffs and Appellants,
vs.
JOHN A. VOS, LAW OFFICES OF
JOHN A. VOS, and DOES 1 through 10
Defendants and Respondents /

No.162817
JUDGMENT

ORDER GRANTING DEFENDANTS' MOTION FOR NONSUIT HAVING BEEN MADE ON MARCH 6, 1998. IT IS HEREBY

ORDERED, ADJUDGED AND DEGREED: THAT JUDGMENT OF NON-SUIT AGAINST PLAINTIFFS AND IN FAVOR OF DEFENDANTS BE ENTERED, AND THAT THE DEFENDANTS BE AWARD THE COSTS FO THIS PROCEEDINGS.

Dated: Mar 20, 1998 "William McGivern, Jr (seal)"

THE HONORABLE WILLIAM MCGIVERN
JUDGE OF THE SUPERIOR COURT

FIRST APPELLATE DISTRICT
DIVISION TWO

No.A083034
S084778

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

==========

JOSEPH N.Y.TSU Et Al.,
Appellants,
v.

JOHN A. VOS Et Al.,
Respondents

SUPREME COURT
FILED
FEB 16, 2000

==========

APPELLANTS' PETITION FOR REVIEW DENIED.

GEORGE (seal)
Chief Justice

FEB 18, 1998 8:10PM RANKIN SPROAT MIRES TRAPANI ETAL NO. 153 P.1-P.3

MICHAEL J. REISER, ESQ (Bar No. (133621)
Eugens Ashley, esq (Bar No. 171885)
Rankin, Sproat, Mires, Trapani & Reiser
1800 Harrison Street, Suite 1616
Oakland, Ca 94604 (510) 465-3922
Atty for Defendants John A. vos, Law Office of John A. vos

DATE FILED
FEB 20, 1998
Marin County Courts

SUPERIOR COURT OF CALIF COUNTY OF OMARIN

JOSEPH N.Y.TSU et al.,
Plaintiffs and Appellants,
vs.
JOHN A. VOS, LAW OFFICES OF JOHN A. VOS, and DOES 1 through 10
Defendants and Respondents

No.162817
MOTION TO LIMIT Liability & Causation Evidence
/ Trial Feb 18, 1998,

.....defendant acknowledges that the failure of Mr. Vos to appear at the January 7, 1994 Status conference could be determined to be an omission upon which **a lay person could make a determination of negligence, based upon common knowledge and experience.** As such,....for such 'lay person-cognizable'claims of negligence, it may be permissible for the TSUS to present evidence as to this one specific allegation of negligence.... see, e.g, Standly v. Richmond (1995) 35 Cal App 4th 1070; Goebel v. Lauderdale (1989) 214 Cal App 3d 1502.

However, any evidence relating to any other aspect of the defendants' conduct ....is irrelevant....

Date: Blank

s/ Michael Reiser
Attorney for John A. Vos, Law Office of John A. Vos

Joseph N.Y. Tsu and Cecilia W. Tsu — Date Filed March 5,1998

Superior court of California, County of Marin

Joseph N. Y. Tsu and Cecilia W. Tsu Plaintiffs vs. John A. Vos, Law ...) Case No. 162817) Plaintiffs' request for) Judicial Notice Pursuant) to Evidence Code) §§ 451(a) & (c))

Plaintiffs respectfully request .....
11 U.S.C. §§362, 329, 363 .....
Bankruptcy Rule 1007, 8002 .....

California Rule of Professional Conduct.
3-110, 3-500, 3-700, 5-200, 5-220,
State Bar Act:
§§6067, 6068, 6103, 6106 .....
Date: March 5, 1998

Joseph N.Y. Tsu and Cecilia W. Tsu — Date Filed March 5, 1998

Superior court of California, County of Marin

Joseph N. Y. Tsu and Cecilia W. Tsu vs. John A. Vos,...) Case No. 162817) Plaintiffs' Motion in) Limine Rule of Prof) Conduct used to establish) Attorney's civil liability

.....The Trial Practice:Civil Procedure During Trial §16.3 states:The Rule of Professional conduct can be used to establish an attorney's civil liability for breach of duty and can even be judicially noticed to establish an attorney's negligence. ....Authority *Mirabito v. Liccardo* 4 Cal app 4th 41 (1992 First Dist Div Two)..... Dated:March 5, 1998

Joseph N.Y. Tsu and Cecilia W. Tsu — Date Filed March 6, 1998

Superior court of California, County of Marin

Joseph N. Y. Tsu and Cecilia W. Tsu) Case No. 162817
) Plaintiffs' Objection to
) Defendant's Motion for
vs.) Nonsuit for lack of
John A. Vos,...) Expert Witness

Plaintiffs object in the strongest term .....

1. It is predetermined or an excuse to bypass of judicial system, the jury trial, for it lack the foundation for defense. 2. Where numerous, blatant, and egregious violations were not breach of legal technicalities, but violation of professional stands which the trial court has the duty to take judicial notice and also report the matter to the state bar, a willful breach of Rules, any rule of professional conduct enacted under Bus & P. C. §6076, is a ground for disciplinary proceeding. See ...§6077... (Ex 1)

I. Prima Facie case 1. the existing of duties.....

2. Defendant breached these 3. Breach were actual and proximate cause of injury....

II. No need of expert witness ....Pursuant to Evid. ode §669(a)(1)(2)(3) the failure of a person to exercise due care is presumed..... Egregious violation of responsibilities under contract.... Egregious violations of responsibilities under fiduciary duty... (Ex 2)

III. Liability.... Loss of opportunity is sufficient (Ex 3)...Loss considerable settlement value & potential interest (Ex 3).... Rule of Professional conduct used to establish attorney's civil liability (Ex 4) ..... Motion in limine, Rule of Profession conduct can be used to establish attorney's.....

IV. Authorities..... Dated: March 6, 1998

LAW OFFICES OF
JOHN A. VOS (80790)
1363 Lincoln Avenue, Suite 5
San Rafael, Ca 94901
Tel No. (415) 485-5330
Attorney for debtors

DATE FILED
Aug 19, 1993
U.S. BANKRUTPC Ct
San Francisco, Ca

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re:) No. 93-3 3370 TC
Cecilia and Joseph Tsu) Chapter 11 Bankruptcy
Debtors) Completion Papers
)

Attached for the purpose of completing the filing of the above-referenced debtors are the following:

* Summary of Schedules
* Schedule A-Real Property
* Schedule B-Personal Property
* Schedule C-Property claimed as exempt
* Schedule D-creditor holding secured claims
* Schedule E- " " unsec. priority claims
* Schedule F- " " nonpriority claims
* **Schedule G**-Execuory contracts/unexpired lease

Dated: Aug 13, 1993 s/"John A. Vos / bd

The attached **Schedule G** states: No executory contracts or unexpired leases.

I hereby certify that the forgoing is a true and correct copy of theoriginal on file in my office. Dated: 2-23-98 Keenan G. Casady, clerk of Court by "s/ DSqul", Clerk Seal, U.S Bankrutpy Ct

LAW OFFICES OF
JOHN A. VOS (80790)
1363 Lincoln Avenue, Suite 5
San Rafael, Ca 94901
Tel NO. (415) 485-5330
Attorney for debtors

DATE FILED
Aug 27, 1993
U.S. BANKRUTPC Ct
San Francisco, Ca
ENTERED IN BANKRUPTCY
DOCKET Aug 30, 1993

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re:	)	No. 93-3 3370 TC
Cecilia and Joseph Tsu	)	(Chapter 11)
Debtors	)	
	)	

EXPARTE APPLICATION FOR EXTENSION FOR COMPLETION OF FILING and ORDER GRANTING APPLICATION

COMES NOW COUNSEL FOR THE DEBTORS, AND HE SEEKS AN EXTENSION OF TIME WITHI WHICH TO COMPLETE THE FILING.....(1) THIS CASE WAS FILED AS SKELETAL CASE ON JULY 23, 1993.....THE STATEMENT OF AFFAIRS AND ALL SCHEDULES EXCEPT I AND J ARE DONE AND HAVE BEEN SENT TO THE DEBTOR FOR REVIEW, APPROVAL .... THIS MAY NOT BE COMPLETE WITHIN GHER REGUALR 15 DAYS DEADLINE...(6) AT PRESENT, THE DEADLINE IS MONDAY AUGUST 9, 1993. ...FIFTEEN (15) DAYS EXTENSION THROUGH ...TUESDAY AUGUST 24, 1993 WITHIN WHICH TO COMPLETE THE FILING

DATED AUGUST 5, 1993 S "JOHN A. VOS, ESQ

ORDER

IT IS SO ORDERED Initial by MK

Dated: August 25, 1993 Thomas Carlson, Judge

I hereby certify that the forgoing is a true and correct copy of the original on file in my office. Dated: 2-23-98 Keenan G. Casady, clerk of Court by "s/ DSqul" , Clerk Seal, U.S B. Ct

VOS' RECORD IN HIS FILE
Copy obtained through Vos' attorney Mr. Reiser.

Date: Aug 31, 93
From: Bankruptcy court clerk Diane Hendly
By: Vos' office assitant

> "ALLERT!! Debtors Petition ... Order of Dismissal, appeal order. But schedule are incomplete. Schedule H is missing, make motion vacate dismissal & motion to reopen case -and send the missing schedule with it. .... I can't find the Tsu file to do the schedule H (Apparently there are no codebtors-but without the page the schedules are incomplete! & case can be dismissed."

LAW OFFICES OF
JOHN A. VOS (80790)
1363 Lincoln Avenue, Suite 5
San Rafael, Ca 94901
Tel No. (415) 485-5330
Attorney for debtors

DATE FILED
Sept 14, 1993

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re: Tsu,	) No. 93-3 3370 TC (Chapter 11)
Joseph and Cecilia	) **EX PARTE APPLICATION FOR**
Debtors	) **VACATING ERRONEOUS ORDER**
_____	) **OF DISMISSAL**

.... **1.** AN ORDER OF DISMISSALWAS ERRONEOUS PROCESSED BY THE CLERK OF THE COURT ON AUGUST 20TH ... DEBTORS SEEK AN ORDER VACATING THAT ORDER OF DISMISSAL. **2.**...AUGUST 5TH COUNSEL FOR THE DEBTORS SUBMITTED ...EX PARTE APPLICATION FOR EXTENSION FOR COMPLETION OF FILING. **3.** IT IS NOT KNOWN WHEN THE CLERK'S OFFICE RECEIVED THE APPLICAION FOR EXTENSION. APPARENTLY THE APLICATION ...DID NOT GET PROCESSED-- PRESUMABLY DUE TO THE COURT'S ANNUAL 9TH CIRCUIT JUDICIAL CONFERENCE... **5.** IN FACT, THE DEBTORS' STATEMENT OF AFFAIRS AND SCHEDULES WERE FILED AUGUST 19, 1993. **6.** ...THEY ARE IN COMPLIANCE, AND THE AUGUST 20TH ORDER: DISMISSAL WAS ENTERED IN ERROR

DATED: **SEPTEMBER 8, 1993** Law office of John A. Vos
by S "JOHN A. VOS, ESQ."

I hereby certify that the forgoing is a true and correct copy of the original on file in my office. Dated: 2-23-98 Keenan G. Casady, clerk of Court by "s/ DSqul" , Clerk Seal, U.S B. Ct

LAW OFFICES OF
JOHN A. VOS (80790)
1363 Lincoln Avenue, Suite 5
San Rafael, Ca 94901
[la:ApplATY.C11]
Tel NO. (415) 485 5330
proposed* counsel for
Mr. and Mrs. Tsu

DATE FILED
SEPT 15, 1993
U.S. BANKRUTPC Ct
San Francisco, Ca
ENTERED IN BANKRUPTCY
DOCKET SEPT 15, 1993

[*His employment was approved by court on Aug 9, 93 already as required by the Bankruptcy law.]

Debtors' list of Co-Debtors is attached.

Dated: September 8, 1993

"S/John A. Vos"
JOHN A. VOS ESQ

SCHEDULE H - CODEBTORS

In Re: Tsu, Joseph and Cecilia / Debtors

Name and Address of Codebtor

[X] Debtor has no codebtors.

I hereby certify that the forgoing is a true and correct copy of the original on file in my office. Dated: 2-23-98 Keenan G. Casady, clerk of Court by "s/ Desqul" , Clerk

LAW OFFICES OF
JOHN A. VOS (80790)
1363 LINCOLN AVE, SUITE 5
SAN RAFAEL, CA 94901

DATE FILED
SEPT 27, 1993

COUNSEL FOR DEBTORS
Mr. and Mrs. Tsu

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE:	) No. 93 3 3370 TC
	) (CHAPTER 11)
TSU, JOSEPH & CECILIA)	) ORDER VACATING
DEBTORS	) ERRONEOUS ORDER
	) OF DISMISSAL

IT APPEARING TO THE COURT THAT THE AUGUST 20TH ORDER OF DISMISSAL WAS ENTERED IN ERROR, IT IS ORDERED THAT SAID AUGUST 20TH ORDER OF DISMISSAL IS VACATED.

DATED: ~~JULY~~ Sept 22, _____, 1993.

Initial only, not by the judge
THOMAS CARLSON, Judge
United States Bankruptcy court

I hereby certify that the forgoing is a true and correcte copy of the original on file in my office Dated: 2/23/98 Keenan G Casady Clerk of Court By:"s/ D S, Clerk
SEAL UNITED STATES BANKRUPTCY COURT

RECORDING REQUESTED
RECORDER'S OFFICE

When Recorded Mail to:

TRACY FEDERAL BANK
1655 WILLOW PASS ROAD
ATTEN: RED DEPARTMENT

SAN FRANCISCO, CBY

DOC– F467838
Old Republic Title company
Monday, **October 18, 1993**
02:19:35p.m.
ReC 3.00--Pg 1.00
Stp --Mic 1.00
Amt $5.00
TOTAL → $5.00
REEL F 986 IMAGE 0505

LOT 35, BLOCK 1519, other ref: 23/28/4

TRUSTEE'S DEED UPON SALE

DOCUMENTARY TRANSFER TAX IS COMPUTED ON FULL VALUE LESS LIENS AND ENCUMBRANCE AT THE TIME OF SALE $0.00 AND AMOUNT OF CONSIDE RATION **$612,770.16** AMOUNT OF UN PAID DEBT. $612,770.16 GRANTEE IS IDENTIFIED AS THE BENEFICIARY-SERVICE BUREAU A CALIFORNIA CORPORATION
Three signatures

LENDER SERVICE BUREAU A CALIFORNIA CORPORATION Trustee, (whereas designated in the Deed of Trust herein under more particularity described or as duly appointed Trustee). DOES HEREBY GRANT AND CONVEY TO **TRACY FEDERAL BANK**.....all right, title and interest to and .....described as follow:

BEGINNING AT A POINT ON THE SOUTHERLY LINE OF GEARY.....

This conveyance is made in compliance with the terms and provision of the Deed of Trust executed by **JOSEPH N.Y. TSU and CECILIA W. TSU, ...** on **9/08/93** ...for **$612,770.16** ... in witness where of, LENDER SERVICE BUREAU ...has this date 09/22/93. CAUSE THE NAME TO BE .....

LENDER SERVICE BUREAU "s/ H.B. Mandoza", Vice President

STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO On 09/22/93 before me, the undersigned, a Notary Public personally appearted, personally known to me .....

WITNESS MY HAND AND OFFICIAL SEAL

"s/ RENUKA BAHADUR" OFFICIAL SEAL, Notary Public

TRANSCRIPT OF COURT PROCEEDINGS

BEFORE: HON. THOMAS E. CARLSON, U.S. B. JUDGE

Date: December 6th, 1993. Court hearing (The other part of this hearing is at APP 34) This part here are the record of 1. Concealment of the missing schedule H and the recorded deeds; 2. Order on condition to record the deeds--Vos to file Motion under §363 in order to use rental income; 3. Feb 1, 94 plan and disclosure statement be due.

From p. 1:19ff

THE COURT: The Court previously dismissed this case under its automatic dismissal for failure timely to file the schedules. That dismissal was vacated. It seems to me that the -- with the vacation, it says if the order was never entered, because the initial order was vacated.

Mr. Vos: I would say that's --do--

THE COURT: All right. I'm further inclined to set a deadline whereby a plan would be confirmed or property would be sold, or the note reinstated, which you'd have to sell another --

Mr. Vos: Correct.

THE COURT: --and apply it all to reinstate this note, and to **condition the recording of the deed on** that without vitiating the sale; **condition the recording of the deed** on that. Provided that the -- **I don't think a foreclosure's complete until you record the deed,** so **the plan** can take care of it.

.....The creditor should .... On the other hand, but for that minor administrative failure, they would have to come in here and show some default by the debtor post-petition with respect to this obligation and the prosecution of the case. **And that is all going to be taken care of by this order**; that's my thought. .....

THE COURT: What I'm saying -- you aren't going to -- it's not going to make any difference until you can record the deed.

Mr. Scheer (Creditor, co-conspirator) : The trustee's deed.

THE COURT: The trustee's deed. ...what I'm saying is that if relief from stay is granted pursuant to this order, it will be made quite clear that it is ordered retroactively so that **there can be no question about that sale; and** then all you have to do is

record the deed. Mr. Scheer: Okay. THE COURT: Okay.

THE COURT: And that takes care of that. As long as the debtor specifically -- I don't know if there's any rule that governs how quickly you have to record the deed, so long as the debtor...

p. 15:11- p. 25

THE COURT: **How long does the debtor need to file a plan?**

Mr. Vos: We'll probably have something filed February or March; confimed, May, June, because I hve heard about this personality for a while, and I'm kind of thinking if that doesn't happen, they have to sell another peice of real estate.

THE COURT: ...a plan is to be filed on Febraury 1, 1994. Disclosure sttement hearing to be on **March 7, 1994.** ....debtor is to file an application to use **cash collateral (rent income)** granting a replacement lien. ...and order **that an application for – to use cash collateral (rental income) is to be filed immediately. ....**

Most important is, the debtor has to file an accounting for the rents. ...accounting and turn over in two weeks. [11 U.S.C§] 362 requires permission to use cash collateral....

The thing should be **filed by the** 20th, this account for the cash collateral.

Mr. Vos: By December 20th, **you Honor**?

THE COURT: Accounting on cash collateral turnover by the 20th if there is --the amount that their accounting shows is to be turned over on the **20th** with the account. .....Regarding **filing of the plan. The disclosure statement** hearing cannot be continued, without permission of the creditor or without court order. .... With respect to relief, if it is granted it is -- it's -- the stay is annulled, to make clear that sale is okay. Debtor is not to use any cash proceeds of cash collateral ... without a **cash collateral order from the court. .... and move forward with the plan.....**

Mr. Scheer: I'll prepare such an order (of this Dec 6, 93 hearing). Mr. Vos: Can I approve of it? Well fax it to me.....

THE COURT: ... He (Vos) has to see the order and have a chance to comment on the forms of the order.

Mr. Vos: We're both in San Rafael.

POLK, SCHEER & PROBER
SPENCER P. SCHEER
State Bar No. 107750
145 North Redwood Dr. Suite 22
San Rafael, Ca 94903 (415)491-8900
Attorney for Tracy Fed Bank

DATE FILED
Dec 28, 1993

U. S. BANKRUPTCY COURT N. D. OF CALIFORNIA

In re
JOSEPH TSU AND
CECILIA TSU
debtors
_____/

Bk. No 93-3-3370
R.S. No. 93-1526
DECLARATION
Hearing date:12-6-93
2:00pm235 Pine Street, S. F.

I, KATHLEEN MILLER, DECLARE AS FOLLOWS:

ON DECEMBER 7, 1993, I TELEFAXED THE ORDER CONDITIONING CONTINUANCE OF AUTOMAIC STAY TO THE DEBTORS ATTORNEY, JOHN VOS.

ON DECEMBER 8, 1993, I TELEPHONED AND VERAFIED THE ORDER WAS RECEIVED. JOHN VOS'S SECRETARY TELEPHONED ON DECEMBER 16, 1993, REQUESTING A HARD COPY TO BE FORWARD TO THEIR OFFICE. I WAS INSTRUCTED TO TELEFAX THE ORDER TO MR. VOS AND REQUEST THAT HE SIGN AND TELEFAX A COPY BACK TO THIS OFFICE. I AGAINS TELEFAXED A REVISED COPY OF THE ORDER TO MR. VOS AT (415) 485-5568.

ON DECEMBER 20, 1993, I TELEPHONED AND REQUESTED A RESPONSE TO THE TELEFAX OF THE ORDER...

ON DECEMBER 21, 1993, I TELEPHONED ...

ON DECEMBER 22, 1993, I TELEPHONED AND LEFT A

ON DECEMBER 23, 1993, I AGAIN TELEPHONED MR. VOS' OFFICE ...I DECLARE UNDER THE PENALTY OF PERJURY THAT THE FOREGOING STATEMENT ARE TRUE.....

DATED: JANURAY-23-93 S/ "KATHLEEN MILLER

I hereby certify that the foregoing is a true and correct copy of the original on file in my office Dated: 2/23/98 Keenan G. Casady Clerk of Court By: "s/D.S., Clerk. SEAL U.S. BANKRUPTCY CT.

POLK, SCHEER & PROBER
SPENCER P. SCHEER
State Bar No. 107750
145 North Redwood Dr. Suite 22
San Rafael, Ca 94903 (415)491-8900
Attorney for Tracy Fed Bank

DATE FILED
JAN 3, 1994

UNITED STATES BANKRUPTCY COURT
NORTHER DISTRICT OF CALIFORNIA

IN RE
JOSEPH TSU AND
CECILIA TSU
debtors

BK. No 93-3-3370
R.S. No. 93-1526
CHAPTER 11
ORDER CONDITIONING CONTINUANCE OF AUTOMATIC STAY
2:00 p.m12-6-93
235 Pine Street, S. F.

.....IT IS ORDERED THAT AFTER DISMISSED SECURED CREDITOR HELD ITS FORECLOSRE SALE OF THE REAL PROEPRTIES LOCATE AT 6125-6127 Geary BOULEVARD.. ON **SEPTEMBER 8, 1993, TRUSTEE'S DEEDS UPON SALE WERE RECORDED** .... THE RECORDATION OF SECURED CREDITOR'S **TRUSTEE'S DEEDS UPON SALE AND PERFECTION OF TITLES** SHALL ONLY **BE DEEMED VALID** IN ACCORDANCE WITH THE FOLLOWING TERMS AND CONDITIONS: ....

DATE: 1-3-94 "s/ M.K" (not the judge)
U.S. BANKRUPTCY JUDGE

APPROVED AS TO FORM & CONTENT,
BLANK WITHOUT VOS' SIGNATURE
JOHN VOS, ATTORNEY FOR DEBTORS

I hereby certify that the foregoing is a true and correct copy of the original on file in my office Dated: 9/3/97 Keenan G. Casady Clerk of Court By: "s/Matt Given", Clerk SEAL U S B. Ct.

Joseph & Cecilia Tsu
6139 Geary Blvd
San Francisco, Ca 94121
415/386-3311

DATE FILED
JAN 27, 1994
U.S.Bankruptcy Court
San Francisco, Ca

UNITED STATES BANKRUPTCY COURT
NORTHER DISTRICT OF CALIFORNIA

In Re:	) Case No.
Tracy Federal Bank	) 93-3-3370-TC
Creditor	) Chapter 1
Polk, Scheer & Prober	) **Motion to Vacate The**
145 North Redwood Dr	) **Dismissal of the Case**
Suite 200	)
San Rafael, Ca 94403	) Hearing -
Attorney for	) Date: Feb 14, 1994
Tracy Fed Bank	) Time: 9:00 A.M.
	) Place: Bankruptcy
Joseph & Cecilia Tsu	) Court, 235 Pine St.
Debtors	) San Francisco, Ca

To All The Counsels And Parties
In Regard To he Above Mentioned Case:
Motion request to vacate the dismissal has been filed, and the hearing has been set at the above date and time, at the Bankruptcy Court, 235 Pine Street, San Francisco, Ca

Date: January 27, 1994

s/Joseph Tsu, Debtor s/Cecilia Tsu, Debtor

I hereby certify that the foregoing is a true and correct copy of the original on file in my office Dated: 2/23/98 Keenan G. Casady Clerk of Court By: "s/D.S., Clerk. SEAL U.S. BANKRUPTCY CT.

TRANSCRIPT OF COURT PROCEEDINGS

BEFORE: HON. THOMAS E. CARLSON, U.S. BKCY JUDGE
Date: DECEMBER 6TH, 1993 COURT HEARING, **The financial condition of the case as stated bu Vos in Court during this 1st hearing.** (the other part of this hearing at APP 29-30)

VOS: "...THEY ARE RESTAURANTS. ONE'S A THREE STORY CHINESE RESTAURANT--

COURT: ARE THEY STILL OPERATING?

VOS: THEY'RE STILL OPERATING. ONE IS --THEY OPERATE, AND ONE THEY LEASE OUT AND GET RENTAL INCOME. (p.5:2-7 OF THE TRANSCRIPT)

VOS: THEY TRIED TO SELL THE LEASED-OUT PROPERTY WHERE THE PIZZZA RESTAURNT IS BEING OPERATED BY SOMEBODY ELSE. THE SBA WOULDN'T ALLOW THE RE-LEASE OF THAT COLLATERAL WHAT WOULD HAVE PAID ROUGHTLY HALF OF THE LOAN, THAT'S A ONE STORY PROPERTY AND THE OTHER IS THREE-STORY. (p.5:9-17)

VOS: THERE'S PLENTY OF EQUITY. THEY'RE HAPPY TO MAKE PAYMENTS. THEY DO HAVE A CONCEPT FOR REORGANIZATION. THE CONCEPT IS THERE' S A FAMOUS PERSONALITY WHO'S IN THE COOKING BUSINESS (Martin Yen) THAT IS LOOKING FOR DEMONSTRATION KITCHEN. THEY'VE BEEN IN CONSULTATION WITH HIM.. SINCE FILING THEY'VE HAD FOUR MEETINGS AND IF SOME-THING CAN HAPPEN WITH HIM THAT'S A SOUCE OF INCOME. (p.6:2-9) A business plan was done with the consul-tation of the head of Hospitality Dept, University of San Francicso.)

VOS: THEY ALSO HAVE ANOTHER PIECE OF PROPERTY (not secured by SBA loan) THEY'VE OWNED THE LONGEST....THEY ARE HAPPY AS PART OF A PLAN OF REORGANIZATION, TO THROW THAT IN THE POT. ... THEY ARE NOT UNDER WATER...." (p.6:21- p.7:10)

STATUTES INVOLVED

11 U.S.C. §362 Automatic Stay provides in relevant part:
(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, ... operates as a stay, applicable to all entities, of ---
(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
(4) any act to create, perfect, or enforce any lien against property of the estate;
(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
(c) Except as provided in subsection (d),(e), and (f) of this section---(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and (2) the stay of any other act under subsection (a) of this section continues until the earliest of --(A) the time the case is closed; (B) the time the case is dismissed; or (C).. a case under chapter 9,11,12, or 13 of this title, the time a discharge is granted or denied.
(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances,may recover punitive damages.

11 U.S.C.§363 Use, sale or lease of property

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents.....

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.....
(c)(1)(c)(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless-- (A) each entity that has an interest in such cash collateral consents; or (B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

Bankruptcy Rule 7062 Stay of Proceedings to Enforce a Judgment (Rule 62 F.R. Civ.P. applies in adversary proceedings "Subdivision (a) of Rule 62 of the Federal Rules of Civil Procedure is applicable in Bankruptcy cases by virtue of Bankruptcy Rule 7062, Subdivision (a) provides:
(a) Automatic stay: Exceptions, Injections, Receiverships, and Patent Accounts. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court.

Bankruptcy Rule 8002(b) Effect of Motion on Time for Appeal. If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion: ....(4) for relief under Rule 9024 if the motion is filed no later than 10 days after the entry of judgment.

California Evid. code §669(a) The failure of a person to exercise due care is presumed if:
(1) He violated a statute, ordinance, or regulation of a public entity;
(2) The violation proximately caused death or injury to a person or property;
(3) The death of injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
(4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.